

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES E. WILLIAMS

Defendant-Appellant.

UNPUBLISHED
December 5, 2000

No. 209249
Oakland Circuit Court
LC Nos. 96-148882-FH;
96-148883-FH;
96-148884-FH;
96-148885-FH;
96-148886-FH

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant Charles E. Williams was convicted in separate proceedings of delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), four counts of delivery of less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and one count of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). In a single proceeding, he was sentenced to life imprisonment without parole, MCL 333.7413(1)(a); MSA 14.15(7413)(1)(a), on the delivery of 50 but less than 225 grams of cocaine conviction, and one to twenty years' imprisonment on the remaining convictions. He appeals as of right.¹ We affirm.

Defendant first argues that he was denied his constitutional right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. "To determine whether a defendant has been denied his right to a speedy trial, this Court considers (1) the length of delay, (2) the reason for the delay, (3)

¹ Although defendant's claims of appeal applied to all six convictions, he raises issues germane to only his conviction for delivery of 50-225 grams of cocaine. In addition, he provided no transcripts from the trial proceedings of the remaining cases. We consider the appeals from the remaining cases to be abandoned. See *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992) (review of merits of issue abandoned when defendant failed to present argument); *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991) (claim of error in admission of evidence abandoned when transcript of hearing concerning admissibility of evidence was not filed).

the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant." *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A delay of more than eighteen months is presumed to be prejudicial and the prosecution bears the burden of proving lack of prejudice to the defendant. *Id.* When the delay is less than eighteen months, the burden is on the defendant to show prejudice as a result of the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994).

The length of the delay in the present case, fifteen months between the date of arrest and the date of trial, was not excessive and was attributable in part to defendant's decision to withdraw his guilty plea. Further, defendant waited until the day of trial to raise this issue. His failure to timely assert his right to a speedy trial weighs against a finding that his right to a speedy trial was violated. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

As for prejudice to his defense, defendant has not offered any facts to show that evidence was lost or destroyed during the time this case was pending. *Wickham, supra* at 112-113. While defendant argued that the informant was no longer available to testify at the time of trial, but would have been available in July 1997 if trial had occurred then, this was wholly speculative. There was no offer of proof made or evidence produced to support this statement. Nonetheless, evidence at trial indicated that the informant had appeared in court previously when asked to do so. More importantly, the informant's absence at trial did not significantly prejudice defendant's rights because he had been cross-examined at the preliminary examination and his transactions with defendant were recorded on videotape and audiotape. There is no reason to believe that, if the informant had been available to testify, his testimony would have changed the outcome of this case. Defendant failed to sustain his burden of showing prejudice. We conclude that defendant's right to a speedy trial was not violated.

Defendant also argues that dismissal is warranted because the 180-day rule, MCL 780.131; MSA 28.969(1), was violated. However, because defendant was required to serve any sentence received in this case consecutive to the sentence he was already serving at the time of trial, the purpose behind the 180-day rule does not apply. *People v Smith*, 438 Mich 715, 717-718; 475 NW2d 333 (1991) (Levin, J.); *People v Chavies*, 234 Mich App 274, 280-281; 593 NW2d 655 (1999); *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993). Thus, defendant is not entitled to relief on this basis. *Id.*

Defendant contends that his trial attorney was ineffective because his conduct at trial possibly alienated the trial judge. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Although we find some support in the record for defendant's factual claim that counsel's conduct was unprofessional and disrespectful at times, defendant has not shown that counsel's conduct prejudiced his right to a fair trial. *People v Pickens*, 446 Mich 298, 331-332; 521 NW2d 797 (1994). The trial court confined its criticisms to defense counsel alone, not defendant. The trial judge also made it clear in his findings that he was able to distinguish between counsel's offensive conduct and the issues

he was required to decide. Thus, defendant has not shown that there is a reasonable probability that, but for counsel's conduct, the result of the proceeding would have been different.

Defendant next argues that the trial court erred in admitting tape recordings of conversations between defendant and the informant. The decision whether to admit evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). The trial court correctly ruled that MCL 750.539c; MSA 28.807(3) did not bar the admission of this evidence because, under MCL 750.539g; MSA 28.807(7), the tape recordings were not illegal. *People v Collins*, 438 Mich 8, 35, n 45; 475 NW2d 684 (1991). Furthermore, the evidence is not barred by the Fourth Amendment or our state constitution so long as one participant to the conversation consented to the recording. *Id.* at 24, 40. Here, notwithstanding the informant's absence at trial, the trial court did not clearly err in finding that the facts and circumstances surrounding the recording amply demonstrated the informant's consent to having the conversation recorded.²

Defendant argues on appeal that the burden was shifted to him to disprove consent. However, defendant did not object on this basis at trial. The point in the record at which defendant claims to have objected contains only an objection to lack of authentication. As we have noted previously, an objection on one ground at trial is insufficient to preserve a claim of error on another ground on appeal. *Winchell*, *supra* at 665. In addition, defendant points to nothing in the record that shifted the burden of proof from the prosecution. The burden of proof is not impermissibly shifted simply because the court allowed the prosecution to prove the informant's consent by circumstantial evidence. Cf. *People v Lauzon*, 84 Mich App 201, 206-208; 269 NW2d 524 (1988) (instruction by trial court that jury could consider circumstances surrounding defendant's conduct to find requisite mental state did not impermissibly shift burden

² Defendant also claims that his rights under the Confrontation and Due Process Clauses were violated. However, at no point at trial did defendant object on either basis. A party may not object on one ground at trial and urge another legal ground on appeal. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). We conclude that defendant has not preserved his claim of error on these theories. In addition, we conclude that manifest injustice would not result from declining to review them. The prosecution used the informant's non-assertive conduct in an attempt to show by circumstantial evidence his consent to the police eavesdropping on his conversation with defendant. Such evidence is not inadmissible as hearsay and presents no Confrontation Clause issue. See *People v Jones (On Rehearing after Remand)*, 228 Mich App 191, 225-226; 579 NW2d 82 (1998). Moreover, defendant presents no argument or authority regarding his claim of a Due Process violation. A party may not simply announce his position and leave this Court to search for argument and authority to support his position. *People v Williams*, 228 Mich App 546, 558; 580 NW2d 438 (1998).

to defendant).³

In a related argument, defendant contends that he was deprived of his rights of confrontation and due process because the prosecutor failed to exercise due diligence to ensure the informant's presence at trial. We review a trial court's determination of due diligence for abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). However, we review findings of fact for clear error. *Id.*

The informant had worked with the police for a number of years and had appeared in previous cases when asked to. He had not provided police with his address or phone number, choosing instead to give a pager number where he could be reached and an address to which his mail could be sent. His reluctance to provide more specific information on his address apparently arose from the fact that he had given police information on a number of persons dealing drugs. Nonetheless, the informant had been served with a subpoena directing him to appear at trial. Approximately one week before trial, the informant told the prosecutor that he did not intend to appear. The prosecutor notified the officer in charge of the investigation about the informant's reluctance to appear. The officer thereafter attempted to contact the informant on a number of occasions. A warrant was issued for the informant's arrest when he failed to appear and the warrant was entered in the Law Enforcement Information Network (LEIN) database.

Defendant characterizes the steps taken by the prosecutor and police as "minimal." We disagree. It is difficult to conceive of any further reasonable steps that could have been taken by the prosecution and police. The trial court did not clearly err in finding that the police exercised due diligence in attempting to locate and produce the informant for trial. *Lawton*, *supra* at 348.

Defendant argues that dismissal is required because of unjustified delay between the time the charged offense were committed and the time of his arrest. Before dismissal will be granted due to a delay in bringing charges against a defendant, there must be a showing of both (1) actual and substantial prejudice to the defendant's right to a fair trial and (2) an intent by the prosecution to gain a tactical advantage. *People v Adams*, 232 Mich App 128, 133-134; 591 NW2d 44 (1998); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). To be substantial, the prejudice to the defendant must have impaired his ability to defend against the state's charges against him such that the outcome of the case was likely affected. *Adams*, *supra* at 135. Proof of "actual and substantial" prejudice requires more than just generalized allegations. *Id.*

In the present case, defendant failed to establish any actual and substantial prejudice to his ability to receive a fair trial. Although defendant argues that the informant's absence

³ To the extent that defendant intended to argue that the tapes were not authenticated, the informant's presence at trial was not necessary in order for the prosecution to admit the tape recordings into evidence. A sufficient foundation for the admission of this evidence was established by the officer in charge, who was familiar with the informant and his presence at the time the recording was made. *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991); MRE 901. The burden was not shifted to defendant to prove that the voice on the recording did not belong to the informant.

sufficiently shows prejudice, there is nothing in the record to indicate that his testimony would have helped the defense. See *White, supra* at 136 (Absence of a witness does not establish prejudice without a showing of what the witness's testimony would have been). To the extent the record discloses any effect, the informant's absence was prejudicial to the prosecution because it was forced to prove by circumstantial evidence his consent to the eavesdropping. In addition, there was no evidence that any delay was intended to allow the prosecution to gain a tactical advantage. The record discloses that the prosecution had delayed bringing charges because the informant was still working with police agencies on other cases, and revealing his identity would have endangered him. The trial court properly denied defendant's request for relief on this issue.

Next, we reject defendant's claim that his life sentence is disproportionate. Under MCL 333.7413(1)(a); MSA 14.15(7413)(1)(a), the trial court was required to impose a non-parolable life term in light of defendant's two prior convictions for drug offenses. *People v Poole*, 218 Mich App 702, 714; 555 NW2d 485 (1996). Because the trial court had no discretion with regard to defendant's sentence, the principle of proportionality does not apply. *Id.* at 715, n 6.

Finally, defendant waived his challenges to the court's restitution order by failing to object at the time of sentencing. *People v Ho*, 231 Mich App 178, 192-193; 585 NW2d 357 (1998).

We affirm.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder